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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 613

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal, First Appellate District, State of California.

Statement as to Jurisdiction

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No. .....

PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
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vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

Appeal from the District Court of Appeal, First Appellate District, State of California.

Statement as to Jurisdiction

In compliance with Rules 13(2) and 15 of the Revised Rules of this Court, appellant, Pacific Gas and Electric Company (Pacific), submits herewith its statement as to the basis upon which this Court has jurisdiction on appeal to review a judgment and decision of the District Court of Appeal of the State of California, the highest court of the State of California in which a decision could be had.

OPINION BELOW

The opinion of the District Court of Appeal is reported at 134 A.C.A. 181[1], 285 P.2d 305. A copy is attached hereto as Appendix A.

JURISDICTION

The judgment of the District Court of Appeal was entered June 27, 1955. A petition for hearing by the Supreme Court of the State of California was filed on August 5, 1955, and denied August 17, 1955. The State Supreme Court had jurisdiction to grant a hearing within 60 days of the decision of the District Court of Appeal, on petition filed within 40 days (Cal. Const. Art. VI, Sec. 4(b) and (c); Rule 28 of California Rules on Appeal).

Notice of appeal to the Supreme Court of the United States was filed with the District Court of Appeal on November 8, 1955. The appeal is timely. Title 28 U.S.C. Sec. 2101(c).

The judgment of the District Court of Appeal is that of the highest court of the state in which a decision could be had. No appeal lies from decisions of District Courts of Appeal in California to any other state court. Although the State Supreme Court had discretionary power to grant a hearing, it denied a timely petition that it do so (see above). The judgment of the District Court of Appeal is therefore the judgment to be reviewed. *Market Street Railway Co. v. Railroad Commission of California,* 324 U.S. 548; *American Railway Express Co. v. Levee,* 263 U.S. 19.

The suit was one for refund of sales taxes assessed, in an amount in excess of $300,000, upon the transfer of appellant's entire electric distribution system in Sacramento, California, pursuant to a decree in condemnation. Trial was

1. 134 Advance California Appellate Reports 181.

held on the special defense of the appellee that the suit was barred by Section 6933 of the California Revenue and Taxation Code. Appellant contended that if Section 6933 and Sections 6906 and 6486 of the California Revenue and Taxation Code were construed so as to bar appellant's action on the facts of this case, then those sections were invalid as being repugnant to the constitution of the United States.

Section 6933 provides:

> "Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article 1 of this chapter, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in the County of Sacramento for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> "Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments."

Section 6906 reads as follows:

> "Within 30 days after disallowing any claim in whole or in part the board shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination."

Section 6486, which prescribes the procedure for service of a notice of a deficiency determination, reads as follows:

> "The board shall give to the retailer or person storing, using, or consuming tangible personal property written notice of its determination. The notice may be served personally or by mail; if by mail, service shall be made pursuant to Section 1013 of the Code of Civil Procedure and shall be addressed to the retailer or person storing, using, or consuming tangible personal property at his address as it appears in the

records of the board. In case of service by mail of any notice required by this part, the service is complete at the time of deposit in the United States post office."

Section 1013 of the California Code of Civil Procedure reads as follows:

"In case of service by mail, the notice or other paper must be deposited in the United States post office, or a mail box, sub-post office, substation, or mail chute, or other like facility regularly maintained by the Government of the United States, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or any act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full 100 miles distance between the place of deposit and the place of address, if served by different post offices, but such extension shall not exceed thirty days in all."

The judgment of the District Court of Appeal was that appellant had been served with notice as provided by the above statutes, that those statutes as applied to the facts barred appellant's action and that as so applied, the statutes were valid. The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28 U.S.C., Section 1257(2).

QUESTIONS PRESENTED

Appellant's electrical distribution system in the Sacramento area was taken by condemnation. Deeming this

divestment of property by judicial fiat to be an exercise by appellant of "the privilege of selling tangible personal property at retail", the State of California's Board of Equalization assessed appellant with a sales tax of approximately $300,000. Appellant's counsel promptly questioned the validity of this unprecedented action of assessing a sales tax upon a condemnation award by filing a petition with the Board for a redetermination of the tax. The petition was denied.

Notice of denial of the petition was transmitted with a covering letter addressed to appellant's leading counsel of record, Mr. Chaffee E. Hall, 351 California Street, San Francisco, California, with copy to appellant. The tax was then paid and appellant's counsel filed a claim for refund.

Like the petition for redetermination, the claim for refund bore the names and addresses of appellant's counsel in the usual place, the upper left hand corner of the first page. No other designation of address appeared thereon. The Board denied the claim and mailed a purported notice of the denial. The Board failed to mail the notice to any of appellant's counsel of record. Its only notice was mailed to appellant, a large corporation, at its main office—addressed simply "Pacific Gas and Electric Company, 245 Market Street, San Francisco, California". The notice did not identify the transaction to which it related, other than by reference to the amount of the claim. Although sent to appellant instead of to its counsel, it made no mention of the statutory requirement that a judicial hearing on a claim for refund can be obtained only if suit is filed within 90 days from the date notice of the Board's denial of the claim is mailed.[2] Nor did it give the date of the mailing

2. California Revenue and Taxation Code Section 6933, page 3, supra.

of the notice. The purported notice was received by the Company's auditing department where it was seen by several employees and then placed in that department's files. None of those employees was an attorney and none realized the legal significance of the document. Hence, the notice was not brought to the attention of appellant's counsel. Appellant's counsel did not learn that the Board had denied the claim and mailed a purported notice thereof until 5½ months after the date of mailing. Appellant's counsel finally learned of the denial when it was mentioned during a telephone conversation on another matter between appellant's counsel and counsel for the Board.

Not only did the Board fail to serve notice on appellant's counsel, but during the crucial 90 day period the Secretary and three members of the five-man Board led appellant's counsel to believe, by statements in response to specific inquires about the status of the claim made at the request of appellant's counsel, that the claim had not yet been acted upon.

The California Revenue and Taxation Code makes the mailing of a notice of denial or the lapse of six months from filing the claim (whichever occurs first) a condition precedent to the right to a judicial determination of the validity of the tax. Suit must be filed within 90 days of the mailing of a valid notice of denial. In the instant case, because appellant's counsel did not learn of the denial of the claim until after the 90 days had elapsed, suit was filed more than 90 days after the mailing of the purported notice of denial. It was filed less than 90 days after appellant's counsel were first apprised of the Board's denial of the claim.

The court below has construed the California Code provisions as authorizing a notice of denial given in the form

and manner employed here. It also held that the code provisions as so construed are valid as meeting the constitutional requirements of due process. Accordingly, the court held that appellant's suit is time-barred.

The questions presented by this appeal are:

1. Did the notice, in manner of service and content, meet the constitutional requirements of procedural due process of law that it be reasonably calculated under all of the circumstances to apprise appellant of the Board's denial of the claim for refund, particularly in view of the following:

(a) the purported notice of the claim for refund was not mailed to appellant's counsel of record;

(b) appellant's counsel of record were appellant's sole actually and ostensibly authorized representatives in the matter;

(c) the addresses of appellant's counsel were the only addresses designated in the claim for refund;

(d) the Board recognized the status of appellant's counsel when it served notice of its denial of the petition for redetermination;

(e) the purported notice of denial of the claim for refund did not identify the claim; or specify the date the notice was mailed; or contain any reference to the statutory requirement that an action to obtain a judicial hearing on a claim for refund must be filed within 90 days from the date of mailing the notice of denial?

2. In being deprived of a trial on the merits by application of the 90 day statute of limitation, notwithstanding the fact that before the 90 day period had elapsed the Secretary and a majority of the members of the Board led appellant's counsel to believe that the claim for refund had not been acted upon, was appellant treated in accordance with the

traditional notions of fair play and substantial justice implicit in due process?

3. Where counsel of record handle a quasi-judicial proceeding before an administrative body, can any procedural process of vital legal significance be valid and fulfill the requirements of procedural due process of law if such process is not served upon the counsel of record?

The questions posed above serve to point up various facets of the basic inquiry presented by this appeal, namely: Is the constitutional guarantee of procedural due process substantial enough to protect the people from being deprived of their property without a hearing by "notices" which do not notify, such as that given by the California State Board of Equalization in this case?

STATEMENT OF THE CASE

1. The Material Facts.

The material facts are set forth above in the Questions Presented.

In passing, it should be noted that the facts on this appeal are undisputed. The interpretation of those facts as applied to a constitutional issue is not foreclosed to this Court. The conclusions to be drawn from undisputed facts will be made independently by this Court when a constitutional due process issue is involved. See *United Gas Co. v. Texas,* 303 U.S. 123, 143; *Kansas City So. Ry. v. Albers Comm. Co.,* 223 U.S. 573, 591.

2. The State in the Proceedings at Which, and the Manner in Which, the Federal Questions Were Raised, and the Disposition Thereof.

The federal questions sought to be reviewed were raised in the court of first instance during the course of the open-

ing statement made to the trial court by appellant's counsel in order to apprise the court of the nature of the cause prior to the taking of evidence. Counsel's remarks on this point were as follows:

> "Plaintiff does not deny that a purported notice of disallowance of claim for refund was mailed by defendant more than 90 days prior to the commencement of this action. But plaintiff insists that the purported notice does not constitute a notice in the legal sense because, first, it does not conform either in content or manner of service to the pertinent statutes of this state; and second, if said statutes are so construed as to admit of the form and manner of service of notice followed in this case, then they are unconstitutional as not constituting due process of law under the provisions of the Fourteenth Amendment to the Constitution of the United States." (Reporter's Transcript, p. 3)

The foregoing constitutional argument was developed in appellant's trial briefs. In its Conclusions of Law filed in the cause, the trial court held that both the manner of service and the content of the Notice of Denial were in conformity with the requirements of the applicable statutes and that the statutes, as thus applied, were constitutional.

The federal questions sought to be reviewed were raised before the District Court of Appeal in appellant's Opening Brief filed with that court in which appellant contended that the Notice of Denial was not a valid notice under the applicable statutes because it was improperly addressed and defective in content and that if the Notice be deemed to comply with the applicable statutes, the statutes as so construed do not afford appellant "due process of law" under the Fourteenth Amendment to the Constitution of the United States. The questions thus presented were passed upon by the appellate court in its opinion wherein it held that notice had been

given in conformity with the applicable statutes and that the statutes as thus applied were constitutional.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents to this Court for the first time the question whether due process requires service of notice upon *counsel of record* of a determination by a state administrative agency *which notice starts the running of a brief time period wherein judicial review can be sought,* especially when such notice contains nothing to indicate that it has such legal significance. No decision of this Court directly resolves this question. However, the general requirements of due process applicable to notices are set out in *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, as follows:

> "• • • when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (p. 315)

It is only natural and reasonable that one desirous of informing a party who has counsel of record would serve the notice on counsel. This procedure is followed in courts of law and simple justice requires the same procedure before administrative agencies acting in a quasi-judicial capacity.

As a result of the vast expansion of government by administrative agencies—national, state and local—such agencies have commonly become courts of first resort, i.e., unavoidable preliminary steps to the attainment of judicial hearings. In such instances, the procedural safeguards protecting one's rights at the judicial level mean nothing if similar safeguards do not exist at the administrative level. The

chain of procedural safeguards is no stronger than its weakest link.

The increasing complexity of the individual-state relationship has made the use of counsel essential. When one retains counsel to represent him before an administrative agency or a judicial tribunal he rightfully and of necessity relies completely upon counsel to conduct all aspects of the case. This trust is the essence of the attorney-client relationship. The very nature of this relationship requires that if the client is to be effectively notified, the notice must be served upon the attorney. In this case the only "notice" given was mailed to the client and was in such form that only an attorney could have appreciated that the mailing thereof could have instituted the 90 day period within which judicial review could be sought. Moreover, in this case appellant's counsel were thereafter, but prior to the expiration of the 90 day period, informed by the Secretary and three members of the five-man Board that the claim had not yet been acted upon.

We submit that the questions of due process presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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